

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

WORLD COM INC., ET AL.,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION,
ET AL.,

Respondents.

No. 01-1218

Tuesday,
February 12, 2002

Washington, D.C.

The above-entitled matter came on for
oral argument, pursuant to notice

BEFORE:

THE HONORABLE DAVID B. SENTELLE, Judge

THE HONORABLE DAVID S. TATEL, Judge

THE HONORABLE STEPHEN F. WILLIAMS, Senior Judge

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P R O C E E D I N G S

THE CLERK: Case No. 01-1218, et al.
WORLDCOM, INC., ET AL.
v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

Mr. Bradford for Petitioner WorldCom,
Inc., Mr. Ramsay for State Petitioners, Mr. Rogovin
for Respondents, and Mr. Evans for Intervenors.

ORAL ARGUMENT OF DARRYL M. BRADFORD, ESQ.

ON BEHALF OF PETITIONER WORLDCOM, INC.

Good morning, Your Honors. If it please
the Court, I'd like to reserve three minutes of my
times for rebuttal.

I'd like to start this morning with the
FCC's flawed statutory analysis in its Order of Remand
stemming from this Court's decision in Bell Atlantic,
and then at the end of my argument I'd like to turn to
the new intercarrier compensation regime, which I
think needs to be vacated as arbitrary, capricious,
and discriminatory.

If I could just step back for a second,
Your Honors, the FCC originally held that Section
251(b)(5) of the Act was limited to local traffic. It
then held that calls to ISPs were not entitled to
reciprocal compensation because they were not local

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1 calls. This Court vacated that determination, finding
2 that the FCC had failed to explain why calls to ISPs
3 were different from any other local call.

4 On remand, one would have thought that the
5 FCC would have taken this Court's strong suggestion,
6 found these calls to be local calls like any other
7 local calls.

8 THE COURT: Given that we said in the
9 opinion that the calls did not clearly fit in one
10 category or the other so far as local or interstate,
11 why would one have thought that the Commission would
12 take that as a strong suggestion, counsel?

13 MR. BRADFORD: Because, Your Honor, it
14 would be embracing the Telecommunications Act instead
15 of running from it. What they would have done is they
16 would have said, "Look, these are local calls. We've
17 always treated them as local calls."

18 And we've got some policy concerns here,
19 but there's another section of the Act -- 252(d) --
20 that says rates for reciprocal compensation have to be
21 cost-based. So we can use the tools Congress gave us
22 to cure the policy concerns and the regulatory
23 arbitrage concerns that we have and continue to treat
24 calls to ISPs as local as we have.

25 THE COURT: What you're saying takes me

1 That would be a welcome relief. If the
2 Court would say, "Look, you're entitled to reciprocal
3 compensation for calls to ISPs." That doesn't mandate
4 any particular form or rate. You, FCC, are bound by
5 (d) (2) in cost-based rates. This case should be
6 remanded for the FCC to determine what scheme complies
7 with the constraints that Congress imposed in (d) (2).

8 And if that turns out to be bill and keep,
9 and there's a record developed that shows that bill
10 and keep meets the cost-based requirements, then, you
11 know, I would be stuck with that. But I have to have
12 a statutory measure to test it.

13 THE COURT: Let's go back a little
14 further, though. You keep talking about 251(b) (5).
15 But it's completely consistent that 251(g) can't be
16 applied the way the Commission purported to apply it.
17 And at the same time, that these transactions are not
18 governed by 251(b) (5). Isn't that true?

19 MR. BRADFORD: Your Honor, I'm not sure if
20 I follow the question.

21 THE COURT: In other words, there are
22 other escape hatches from 251(b) (5), other than
23 251(g). For example, I mean, simply the fact that in
24 a regular interexchange carrier phone call 251(b) (5)
25 doesn't apply, although you might think by reading its

1 words that it does. But everyone agrees that it
2 doesn't apply to that.

3 MR. BRADFORD: I think that with regard to
4 -- I hope I'm addressing the Court's question. I
5 think that 251(b)(5), there is no escape hatch with
6 regard to calls to ISPs.

7 THE COURT: I'm sorry. There is no --

8 MR. BRADFORD: There is no escape hatch
9 with regard to calls to ISPs.

10 THE COURT: Why is that? Why is that?

11 MR. BRADFORD: Because --

12 THE COURT: Do you really think the
13 analogy between a call to an ISP is so similar to a
14 call to a pizza delivery place that it's got to be
15 treated as local?

16 MR. BRADFORD: I do think that calls to
17 ISPs do have to be treated as local. I think they are
18 local calls because ISPs provided --

19 THE COURT: I thought we were rigorously
20 agnostic about that in Bell Atlantic.

21 THE COURT: Yes. That strong signal I yet
22 have not found, and I read the opinion back when Judge
23 Williams and I were on the case. And I read your
24 brief, and I went back and read our opinion, because
25 I didn't recognize it from your description.

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1 MR. BRADFORD: If I overstated the --

2 THE COURT: When we flatly said that they
3 don't -- doesn't clearly fit in either category, I'm
4 at a loss as to how you can pass the straight face
5 test with the notion that we've given some strong
6 signal that this is a local call.

7 MR. BRADFORD: Well, let me -- if I stated
8 it, Your Honors, I apologize. It was not my intent to
9 do so.

10 THE COURT: Oh, sure it was.

11 (Laughter.)

12 MR. BRADFORD: But I think what the Court
13 was getting at is that there's a lot of similarities
14 between these calls and other local calls that are
15 derived from the statutory language and are derived
16 from the fact that ISPs are end users. And even if
17 you're going to use this end-to-end analysis, it's
18 hard to figure out how you start at one end and the
19 ISP, being an end user, isn't at the other end.

20 And you've always treated this traffic as
21 local, and FCC -- you have to deal with these problems
22 if you're going to say this isn't a local call. And
23 what they did is they didn't do they. They
24 sidestepped it.

25 THE COURT: How does the Commission treat

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1 limiting principle to what you just said. We can act
2 under 251(g) because we've always had a plan.
3 Therefore, the Petitioners can't attack our plan
4 successfully, whatever the plan is?

5 MR. ROGOVIN: Well, Your Honor, the plan
6 is, indeed -- is a valid exercise of Section 201,
7 which is what the --

8 THE COURT: But if it's a valid exercise
9 of 201, let's say enough to overcome other provisions
10 of the statute, why isn't that enough?

11 THE COURT: Then you don't need 251(g).

12 THE COURT: You don't need 251(g).

13 MR. ROGOVIN: Your Honor, I don't think
14 that we're saying that 251(i) is a sufficient grant of
15 authority to allow us to go forward and resolve this
16 case in the face of 251(b)(5). I think what we're
17 saying is that the interplay between 251(b)(5) and
18 251(g) -- first of all, it is ambiguous on its face.
19 I don't think it's absolutely clear --

20 THE COURT: Again, I mean, I think
21 251(b)(5) is bristling with ambiguity. But I'm not
22 sure that 251(g) helps you in your quest.

23 MR. ROGOVIN: Well --

24 THE COURT: Did you mean to say that
25 251(b)(5) is ambiguous on its face?

1 MR. ROGOVIN: Your Honor, I meant to say
2 that I think reconciling the two of them together and
3 applying them here to the situation where you have the
4 joint provision of access to an information --

5 THE COURT: Well, I ask the question
6 because at one point in your brief -- and I think it's
7 on page 28 -- you seem to be arguing that -- you seem
8 to be relying on Bell Atlantic for the proposition
9 that 251(b) (5) -- the word "telecommunications" is, in
10 and of itself, ambiguous, without any need to refer to
11 251(g). Were you intending to make that argument?

12 MR. ROGOVIN: I think what we were
13 intending to argue is that the word
14 "telecommunications" in 251(b) (5) appears to apply to
15 all telecommunications, and it may well be that this
16 very traffic is covered by 251(b) (5), which requires
17 us to look to 251(g) if we're to --

18 THE COURT: Well, another thing would just
19 be to resolve the ambiguity of 251(b) (5).

20 MR. ROGOVIN: Well, that certainly was not
21 decided and was not the focus of the Commission's
22 decision.

23 THE COURT: That may be one of your
24 problems. Judge Williams was pointing out to opposing
25 counsel the cases we have on the standing question

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1 THE COURT: But if it hadn't come up
2 before the '96 Act, then how can it be covered by (g),
3 which applies by its terms to those regulating sources
4 that are in effect before February 8th of '96?

5 MR. EVANS: I think the answer, Judge
6 Sentelle, is that to make sense of 251(g), to make
7 sense of what Congress was trying to do, it has to be
8 preserving the regime. The regime is not just the
9 specific things that had been answered, but the regime
10 is the set of principles that govern how those
11 questions would be answered.

12 And that is why, without complaint from
13 anybody, the FCC has continued to make changes in its
14 exchange access rules and charges, pulling in
15 interstices at great length, repeatedly, since 1996.
16 No one has challenged that, and yet it falls clearly
17 within the combination of 251(g) and 251(i). That's
18 how the Commission has continuing authority to deal
19 with it, because telecommunications --

20 THE COURT: Are these cases where there is
21 some other provision of the Act which the Commission
22 has not found is inapplicable, and other people are
23 claiming is applicable?

24 MR. EVANS: Well, I think there --

25 THE COURT: Because, I mean, it seems to

1 me that's what creates the problem. The Commission
2 assumes that 251(b)(5) is applicable, but then nudges
3 around it.

4 MR. EVANS: Well, Judge Williams, the
5 Commission also in its current thinking about the
6 statute, which was a rethinking of the entire
7 structure, said as well that 251(b)(5) applies to
8 exchange access, but for 251(g). 251(g) is the
9 provision that the Commission looked to to explain why
10 it is that after 1996 --

11 THE COURT: Is this sort of rewriting
12 paragraph 1034?

13 MR. EVANS: Yes. I mean, basically
14 rethinking it a little bit. I mean, look, as Mr.
15 Rogovin said, this is an agency that did something
16 very rare in this Court's experience. A case is
17 vacated, remanded, and the agency says, "Hey, wait a
18 second. Let's step back and start over." I know. I
19 sat in some of the meetings with the Commission staff.

20 They were throwing out all of the
21 assumptions and starting from scratch. And what they
22 realized is that the only sensible way to read the
23 statute is to see in 251(g) a preservation of the
24 regime for exchange access and information access, not
25 one but not the other -- both.